APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1667

UNITED STATES OF AMERICA, *Appellant,*

v.

LOUIS POMPONIO, *Appellee.*

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

No. 74-1668

UNITED STATES OF AMERICA, *Appellee,*

v.

CHARLES J. PILUSO, *Appellant.*

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, District Judge.

Argued October 4, 1974 Decided February 7, 1975

Before BUTZNER, RUSSELL and FIELD, Circuit Judges.

Frank W. Dunham, Jr., Assistant United States Attorney, (David H. Hopkins, United States Attorney, on brief) for Appellant in No. 74-1667; Alan Y. Cole (Lee A. Schutzman & Cole and Groner on brief) for Appellee in No. 74-1667; Albert J. Ahern, Jr. for Appellant in No. 74-1668;

Thomas K. Moore, Assistant United States Attorney, (Brian P. Gettings, United States Attorney, on brief) for Appellee in No. 74-1668.

FIELD, Circuit Judge:

The principal question on these appeals is the sufficiency of an indictment returned by a grand jury in the Eastern District of Virginia against Louis J. Pomponio, Jr., along with his brothers, Peter and Paul Pomponio, and their attorney, Charles J. Piluso, charging them with violating and conspiring to violate the Travel Act, 18 U.S.C. § 1952.[1]

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[1] 18 U.S.C.

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury. As amended Pub. L. 91-513, Title II, § 701(i)(2), Oct. 27, 1970, 84 Stat. 1282.

The charges in the indictment stemmed from payments totaling over $300,000 allegedly made by the defendants to Sidney M. Zneimer, a Vice President of the Royal National Bank in New York City, for the purpose of influencing his conduct relative to a number of loans made by the bank to corporations owned or controlled by the Pomponios.

The indictment tracks the language of the statute charging that the defendants "did willfully travel from the State of Virginia to the State of New York, with the intent to promote, manage, carry on, and facilitate the promoting, managing, establishing and carrying on of an unlawful activity, said unlawful activity being the crime of bribery, in violation of the laws of the State of New York (New York Penal Law Article 180)[2] and of the United States (Title 18, United States Code, Section 215);[3] the said unlawful activity relating to the efforts of Louis J. Pomponio, Jr., Charles J. Piluso and Paul Pomponio to influence

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[2] § 180.00 Commercial bribing

A person is guilty of commercial bribing when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs.

Commercial bribing is a class B misdemeanor.

[3] § 215. Receipt of commissions or gifts for procuring loans.

Whoever, being an officer, director, employee, agent, or attorney of any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation, of a Federal intermediate credit bank, or of a National Agricultural Credit Corporation, except as provided by law, stipulates for or receives or consents or agrees to receive any fee, commission, gift, or thing of value, from any person, firm, or corporation, for procuring or endeavoring to procure for such person, firm, or corporation, or for any other person, firm, or corporation, from any such bank or corporation, any loan or extension or renewal of loan or substitution of security, or the purchase or discount or acceptance of any paper, note, draft, check or bill of exchange by any such bank or corporation, shall be fined not more than $5,000 or imprisoned not more than one year or both.

Sidney M. Zneimer in the performance of his duties at the Royal National Bank by giving the said Sidney M. Zneimer checks, as detailed in the table below * * *."[4]

Prior to trial the defendants filed a motion to dismiss the indictment on the ground that neither commercial bribery under the New York statute nor the receipt of commissions or gifts by a bank official proscribed by section 215 of the federal code constitute "unlawful activity" within the purview of section 1952. Judge Oren R. Lewis declined to grant the motion and set the case for trial. However, Louis J. Pomponio, Jr., was hospitalized because of illness and the trial proceeded against the other three defendants. The court granted a motion for judgment of acquittal of Peter Pomponio and the jury returned a verdict of not guilty with respect to his brother Paul. Charles J. Piluso was found guilty on all three counts and has appealed his conviction in Case No. 74-1668. Thereafter, Louis J. Pomponio, Jr. was tried before Judge Albert V. Bryan, Jr., and was found guilty by the jury. During the course of this trial, Pomponio's counsel challenged the sufficiency of the indictment in a motion for judgment of acquittal. Judge Bryan, understandably, felt bound by the earlier ruling of Judge Lewis and denied the motion. However, Judge Bryan granted Pomponio's post-trial motion for arrest of judgment, holding that "Section 215 of Title 18 of the U. S. Code and the New York Penal Code, in my view do not come within the unlawful activity definition of Section 1952 of Title 18." The government has appealed this action in Case No. 74-1667.[5]

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[4] Although the indictment contained one conspiracy count under 18 U.S.C. § 371 and eight substantive counts, the government proceeded to trial on the conspiracy count and only two of the substantive counts, Counts Nos. V and IX. The quoted language is from Count No. V of the indictment, but charging language to the same effect was employed in the conspiracy count as well as Count No. IX.

[5] The motion in arrest of judgment was granted pursuant to Rule 34, Fed. R. Cr. P., and is appealable under 18 U.S.C. § 3731. *See* Esposito v. United States, 492 F.2d 6 (7 Cir. 1974).

Primarily, the defendants contend that the word "bribery" as used in the Travel Act is intended to mean bribery in the classic sense of the common law which was limited to the corruption of public officials in the administration of their public trust and does not extend to such conduct by private individuals. Concededly, the crime of bribery was originally limited to cases involving the corruption of those in the public service,[6] and some statements in the limited legislative history of the Act might appear to support the position of the defendants.[7] However, while the states and the federal government have enacted statutes dealing with the corruption of public officials, they have also extended the concept of bribery into areas of private conduct which we think appropriately fall within the ambit of the Travel Act.[8] "There can be no question but that any crime of bribery involves moral turpitude."[9] and we discern no reason why the Congress, in using the term "bribery," intended that it be limited to the corruption of public officials.[10] We find the answer to this contention of the defendants in *United States* v. *Nardello*, 393 U.S. 286, 292-293 (1969), where a similar argument with respect to

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[6] *See* 3 Wharton's Criminal Law and Procedure, §§ 1380, et seq., (R. Anderson Ed. 1957).

[7] See Hearing on S. 1654-58, S. 1665 Before the Senate Committee on the Judiciary, 87th Cong., 1st Sess. (1961).

[8] *See, e.g.*, 18 U.S.C. §§ 201, 203, 210, 211 and 214; N.Y. Penal Law §§ 200.00 and 200.10 (McKinney 1973), bribery of a public servant and bribe receiving by a public servant; N. Y. Penal Law §§ 180.15 and 180.25 (McKinney 1967), bribery of a labor official and bribe receiving by a labor official; N. Y. Penal Law §§ 180.40 and 180.45 (McKinney 1967), sports bribing and sports bribe receiving.

[9] United States v. Esperdy, 285 F.2d 341, 342 (2 Cir. 1961).

[10] In the Southern District of New York one judge has reached the conclusion that commercial bribery under the New York statute does not fall within section 1952. United States v. Niedelman, 356 F.Supp. 979 (1973). However, he acknowledged that "[s]imilar contentions have heretofore been considered and rejected in this District [in four other decisions]." *Id.* at 981.

the meaning of the word "extortion" in the Act was urged upon the Court. In rejecting this argument the Court stated:

> "Appellees suggest, however, that Congress intended that the common-law meaning of extortion—corrupt acts by a public official—be retained. If Congress so intended, then § 1952 would cover extortionate acts only when the extortionist was also a public official. Not only would such a construction conflict with the congressional desire to curb the activities of organized crime rather than merely organized criminals who were also public officials, but also § 1952 imposes penalties upon any individual crossing state lines or using interstate facilities for any of the statutorily enumerated offenses. The language of the Travel Act, 'whoever' crosses state lines or uses interstate facilities, includes private persons as well as public officials."

Paraphrasing the language of the Court in *Nardello,* "[i]n light of the scope of the congressional purpose we decline to give the term [bribery] an unnaturally narrow reading * * * and thus conclude that the acts for which [defendants] have been indicted fall within the generic term [bribery] as used in the Travel Act." 393 U.S. at 296.

The defendants further contend that since 18 U.S.C. § 215 criminalizes only the act of the bank officer who receives the proscribed thing of value, they as payors could not be convicted of an offense under that statute [11] and, accordingly, it was improperly designated as an "unlawful activity"

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[11] Incident to this contention, counsel in their arguments and briefs discussed at some length the dichotomy with respect to the question of whether the payor can be convicted as an aider and abettor under a statute such as 18 U.S.C. § 215. *See* United States v. Kenner, 354 F.2d 789 (2 Cir. 1965); United States v. Bowles, 183 F.Supp. 237 (D.C. Me. 1958); *cf.* May v. United States, 175 F.2d 994 (D.C. Cir. 1949); *see also* United States v. Johnson, 337 F.2d 180 (4 Cir. 1964).

in the indictment.[12] As pointed out in *United States* v. *Wechsler*, 392 F.2d 344 (4 Cir. 1968), the fallacy in such an argument lies in a too heavy reliance on the role played by section 215 in the indictment, and elides the fact that it serves "only as a background identification of the unlawful activities."[13] The "unlawful activity" specified in the Act may be bribery under either state or federal law and reference to such law is necessary only to identify the type of "unlawful activity" in which the defendants intended to engage. Proof that the unlawful objective was accomplished or that the referenced law has actually been violated is not a necessary element of the offense defined in section 1952. *See United States* v. *Rizzo*, 418 F.2d 71 (7 Cir. 1969); *McIntosh* v. *United States*, 385 F.2d 274 (8 Cir. 1967). Accordingly, we find it sufficient that the indictment charged the defendants with interstate travel with the intent, *inter alia*, to facilitate the violation of the federal statute by Zneimer. Finally, the defendants argue that our construction of the Act improperly escalates these underlying misdemeanors to federal felonies, but such a contention has been summarily rejected by the courts. *United States* v. *Karigiannis*, 430 F.2d 148 (7 Cir. 1970); *United States* v. *Brennan*, 394 F.2d 151 (2 Cir. 1968).

We have considered the other points raised on Piluso's appeal and find no reversible error. Accordingly, the conviction in No. 74-1668 is affirmed. The order of the district court granting Pomponio's motion in arrest of judgment in No. 74-1667 is reversed, and the case is remanded for further proceedings consistent with this opinion.

AFFIRMED IN CASE NO. 74-1668.

REVERSED AND REMANDED
IN CASE NO. 74-1667.

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[12] Defendants take the position that if either the New York commercial bribery law or the federal statute was improperly included in the indictment, the indictment must fall. In view of our disposition of the case, we find it necessary to reach this point.

[13] 392 F.2d at 346.

APPENDIX II

CLERK'S MEMORANDUM

Enclosed is a copy of the opinion. Judgment was entered on February 7, 1975. Counsel desiring to tax costs against the unsuccessful party under Rule 39, FRAP, is requested to furnish an itemized statement from the printer showing the actual cost per page for reproducing the brief and appendix.

WILLIAM K. SLATE, II, *Clerk*

APPENDIX III

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1667

UNITED STATES OF AMERICA, *Appellant*,
v.
LOUIS POMPONIO, *Appellee*.

Order

Upon consideration of appellee's petition for rehearing and suggestion for rehearing on en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is, therefore, ORDERED, That the petition for rehearing be and it is hereby denied.

For the Court—By Direction.

/s/ WILLIAM K. SLATE, II
Clerk

A True Copy, Teste:

WILLIAM K. SLATE, II
Clerk

By /s/ FRANCES S. SEWELL
Deputy Clerk

Filed March 4, 1975

WILLIAM K. SLATE, II
Clerk

APPENDIX IV

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal No. 269-73-A

THE UNITED STATES

v.

LOUIS J. POMPONIO, JR., *Defendant.*

THE COURT: I think the Court of Appeals ought to settle it. I have regard, of course, for the position of my associate, Judge Lewis, on the same matter. My disagreement with him is just that, and no more. However, the case is now before me for decision on this motion for arrest of judgment. I think the motion is well taken.

I am relieved to find that the Government, in accordance with the *Esposito* case, can appeal. I think the Defendant will be hard put to plead double jeopardy if the Government is successful in its appeal, having cited that case to me in support of its argument that the verdict may be reinstated if it is not reversed on other grounds.

I will, therefore, in accordance with Rule 34, arrest the judgment on the specific ground—and lest there be any mistake about it, I want to make sure that the specific ground of the arrest of judgment is that the indictment, Counts, I, V and IX do not charge an offense, and the reason I am of the view that they do not charge an offense is because the unlawful activity referred to in the indictment as being promoted or furthered by the Defendant, Louis J. Pomponio, Jr., namely, Section 215 of Title 18 of the U. S. Code and the New York Penal Code, in my view do not come within the unlawful activity definition of Section 1952 of Title 18.

I do not believe that there would be a requirement, before the Government would appeal, that sentence be im-

posed in the case and, therefore, I will postpone sentencing, retaining jurisdiction of the case, however, for sentencing should on appeal the case be reversed.

I hereby certify that the foregoing is a true transcript of the oral statement of the Court from the Bench.

/s/ FRANCES WEBB
Reporter

APPENDIX V

Filed in Open Court Sep. 24, 1973
Clerk, U. S. District Court
Alexandria, Virginia

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal No. 269-73

UNITED STATES OF AMERICA

v.

LOUIS POMPONIO, JR.

JULY *1972* SPECIAL TERM GRAND JURY—At Alexandria

THE GRAND JURY CHARGES:

A. 1. That the defendants, LOUIS J. POMPONIO, JR., PAUL POMPONIO and PETER POMPONIO, hereinafter referred to either individually or as "the POMPONIOS," at all times mentioned in this indictment, maintained residences and offices in the State of Virginia and were endeavoring through a network of family controlled corporations to build, own and operate high-rise buildings in Northern Virginia and the District of Columbia.

2. That the defendant, CHARLES J. PILUSO, Esquire, at all times material herein, maintained a residence and an office in the State of Virginia and was associated in the endeavors of the brothers referred to in paragraph A. 1. above.

3. That Sidney M. Zneimer, at all times material herein, resided in the State of New York and was a vice president of the Royal National Bank and worked at the offices of said bank located in New York City in the State of New York with general responsibility for reviewing and evaluating requests for construction loans, arranging for participation by other lending organizations when an approved loan request was contingent on such arrangements being made, and general administration of the loan, including authorization of progress advances.

4. That at all times material herein, the Royal National Bank was a national banking institution located and conducting business in the State of New York.

5. That at all times material herein:

a. Martin Van Buren Corporation was owned and controlled by the POMPONIOS for the principal purpose of owing land and the Martin Van Buren Building located thereon during and subsequent to construction of said building.

b. James Polk Corporation was owned and controlled by the POMPONIOS for the principal purpose of owning land and the James Polk Building located thereon during and subsequent to construction of said building.

c. Abington Realty Corporation was owned and controlled by the POMPONIOS for the principal purpose of owning land and the Pomponio Plaza East Building located thereon during and subsequent to construction of said building.

d. National Center Corporation was owned and controlled by the POMPONIOS for the principal purpose of obtaining and owning land and developing on it what later became known as the National Center in Arlington, Virginia.

e. Federal Realty and Development Corporation was owned and controlled by the POMPONIOS for the principal purpose of owning land and the Commonwealth Building located thereon during and subsequent to construction of said building.

f. James Buchanan Corporation was owned and controlled by the POMPONIOS for the principal purpose of owning land and the James Buchanan Apartments located thereon during and subsequent to construction of said apartments.

g. Zachary Taylor Corporation was controlled by the POMPONIOS for the principal purpose of owning land and the Zachary Taylor Building located thereon during and subsequent to construction of said building.

* * *

i. Virginia Corporation was controlled by the POMPONIOS for the principal purpose of owning land and the Patrick Henry Building located thereon during and subsequent to construction of said building.

6. That at all times material herein, it was a violation of the criminal laws of the State of New York for any person to confer any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs.

7. That at all times material herein, Real Equity Consultants was a corporation controlled, owned and operated by Sidney M. Zneimer for the benefit of Sidney M. Zneimer.

B. That commencing on or about September 1, 1967, and continuously thereafter up to and including the date of this indictment, the exact dates to the grand jurors being unknown, in the Eastern District of Virginia and elsewhere, the defendants, LOUIS J. POMPONIO, JR., PETER POMPONIO, PAUL POMPONIO and CHARLES J. PILUSO, did knowingly, willfully and unlawfully combine, conspire, confederate and agree with each other and with Sidney M. Zneimer, an unindicted co-conspirator, and with divers other persons to the grand jury unknown, to commit certain offenses against the United States, in violation of the provisions of Section 1952 of Title 18, United States Code in that the defendants would travel and willfully cause others to travel in interstate commerce and that they would use and willfully cause others to use facilities in interstate commerce, including interstate banking facilities, * * *, air terminals, commercial limosine service, credit cards, and commercial air travel, all of the above with the intent to promote, manage, establish, and carry on and facilitate the promoting, managing, establishing and carrying on of an unlawful activity, said unlawful activity being the crimes of commercial bribery, in violation of the laws of the State of New York and the paying of commissions to an officer of a bank, the deposits of which were insured by the Federal Deposit Insurance Corporation, for procuring loans from said bank, in violation of Title 18, United States Code, Section 215, and it was further a part of the conspiracy that the defendants would thereafter perform and cause others to perform acts promoting, managing, establishing, and carrying on of said unlawful activities and acts facilitating the promoting, managing, establishing, and carrying on of said unlawful activity.

* * * *

COUNT V

B. From on or about March 12, 1970 through November 19, 1971, in the Eastern District of Virginia and elsewhere, LOUIS J. POMPONIO, JR., * * * did willfully travel from the

State of Virginia to the State of New York, with the intent to promote, manage, carry on, and facilitate the promoting, managing, establishing and carrying on of an unlawful activity, said unlawful activity being the crime of bribery, in violation of the laws of the State of New York (New York Penal Law Article 180) and of the United States (Title 18, United States Code, Section 215); the said unlawful activity relating to the efforts of LOUIS J. POMPONIO, JR., CHARLES J. PILUSO and PAUL POMPONIO to influence Sidney M. Zneimer in the performance of his duties at the Royal National Bank by giving the said Sidney M. Zneimer checks, as detailed in the table below, and drawn on the Royal National Bank of New York, payable to Real Equity Consultants, Inc., and that thereafter the defendants did perform and attempt to perform the acts of promoting, managing, establishing and carrying on and facilitating the promoting, managing and carrying on of said unlawful activity.

Date of Check	No. of Check	Account	Amount
3/12/70	294	James Buchanan Corp	$25,000
3/13/70	101A & T-1	Zachary Taylor Corp.	25,000
5/27/70	248	Zachary Taylor Corp.	25,000
10/ 5/70	1010	Columbia Plaza Corp.	25,000
1/ 4/71	145	Virginia Corp.	25,000
1/11/71	1186	Columbia Plaza Corp.	25,000
10/ 6/71	122	Chester Arthur Corp.	25,000

(Violation of Title 18, United States Code, Sections 1952 and 2)

* * * *

COUNT IX

B. On or about December 13, 1971, in the Eastern District of Virginia, LOUIS J. POMPONIO, JR., * * * caused Lewis Payne to travel from the State of Virginia to the State of New York, with the intent to promote, manage, carry on and facilitate the promoting, managing, establishing and

carrying on of an unlawful activity, said unlawful activity being the crime of bribery, in violation of the laws of the State of New York (New York Penal Law Article 180) and of the United States (Title 18 United States Code, Section 215); the said unlawful activity relating to the efforts of Louis J. Pomponio, Jr., Paul Pomponio and Charles J. Piluso to influence Sidney M. Zneimer in the performance of his duties at the Royal National Bank, and that thereafter the defendants did perform and attempt to perform the acts of promoting, managing, establishing and carrying on, and facilitating the promoting, managing and carrying on of said unlawful activity. (Violation of Title 18, United States Code, Sections 1952 and 2)

APPENDIX VI

UNITED STATES DISTRICT COURT,
S.D. NEW YORK,
CRIMINAL DIVISION.

April 6, 1973

No. 72 Cr. 1127

United States of America,

v.

Hilda F. Niedelman, *Defendant.*

* * * * * * * * * *

Memorandum and Order

Whitman Knapp, District Judge.

Defendant Hilda Niedelman moves to dismiss an indictment charging her with one count of conspiracy, twenty-three "Travel Act" counts, and twenty-three mail fraud counts. She contends that:

1. The Travel Act 18 U.S.C. § 1952, does not cover the alleged offenses commercial bribery.

2. The mail fraud counts are defective in that they fail to identify a victim of the alleged scheme to defraud.

3. The grand jury did not act as a body independent of the United States Attorney in that it did not scrutinize the actual terms of the indictment.

4. There is a possibility that defendant Niedelman's testimony before the grand jury was not heard by every juror that voted to indict her.

5. The prosecutor abused his discretion by seeking to indict defendant Niedelman at all, by treating her so severely in comparison both to her co-defendants and to those charged in companion indictments, and by failing to seek an indictment against either Aviquipo, the corporation of which defendant was Treasurer, or Lockheed, which later acquired it.

I am persuaded that § 1952 was not intended to cover commercial bribery, but reject defendant's other arguments.

I.

Section 1952 provides:

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity;

or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000

or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means

(1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or controlled substances (as defined in Section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or

(2) extortion, bibery, or arson in violation of the laws of the State in which committed or of the United States.

The instant prosecution is based on a combination of (a)(1) and (3) and (b)(2), the government's theory being that defendant Niedelman used the mails with intent to carry on "bribery" in violation of New York Penal Law § 180.00, McKinney's Consol.Laws, c. 40. That statute, entitled Commercial Bribing, provides:

> "A person is guilty of commercial bribing when he confers, or offers or agrees to confer any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs. Commercial bribing is a class B misdemeanor."

The offense charged in the indictment is that defendant Niedelman participated in a scheme whereby payments were mailed from Aviquipo, Inc. to the purchasing agent for Fiat, for the purpose of including such agent to place purchase orders for Fiat with Aviquipo.

Defendant contends that the alleged offense is not punishable by § 1952 because the Congress did not intend to cover the offense known in New York as "commercial" bribery when it used the generic term "bribery."

Similar contentions have heretofore been raised and rejected in this District. See United States v. Maiolo (72 Cr. 1123), United States v. Endresen (73 Cr. 85), United States v. Hohn (72 Cr. 1124), and United States v. Callahan (72 Cr. 1126). I feel constrained to disagree with these determinations.

The Supreme Court's decision in United States v. Nardello (1969) 393 U.S. 286, 89 S.Ct. 534, 21 L.Ed.2d 487 is here controlling. In that case, an indictment under the Travel Act charged the defendants with "shakedown" operations (luring victims into sexual situations of a compromising nature and then extorting money on threat of exposure) committed in Pennsylvania with the aid of instrumentalities of interstate commerce. The District Court dismissed the indictment on the ground that Pennsylvania statutes defined the defendants' unlawful conduct as "blackmail" rather than "extortion" and that the offense was therefore not picked up by the Travel Act. The Supreme Court reversed, ruling that the Travel Act, in providing for Federal punishment of such "extortion" as was prohibited by State law, was intended to reach conduct deemed by the Congress to be extortionate, regardless of the nonenclature employed by State legislatures in punishing the conduct in question. Turning, therefore, to the case at bar, the question is whether or not the Congress had in mind unauthorized payments to purchasing agents when it used the generic term "bribery" in the Travel Act.

As I read the *Nardello* decision, the court laid down some rather clear guidelines for resolving such a question. Interpretation of the Travel Act, *Nardello* declared, should have the effect of carrying forward two basic Congressional objectives: (1) to assist the states in fighting the depredations of the organized underworld (393 U.S. at 290-292, 89 S.Ct. 534); and (2) insofar as possible, to achieve an interpretation having a uniform effect throughout the nation (at 293-294, 89 S.Ct. 534). The interpretation urged by the government in the case at bar would further neither of these objectives, and would utterly thwart the second.

As to the first objective, the extensive Congressional hearings cited by the Court in *Nardello* and by respective counsel in the case at bar contain not so much as a hint that so-called "commercial" bribery (as opposed to conventional bribery, arson and extortion) was ever considered to be a typical tool of the underworld. On the contrary, as the case at bar—like the companion cases of *Maiolo, Endresen, Hohn* and *Callahan*—illustrates, commercial bribery is typically an establishment transgression. Furthermore (as the next paragraph establishes), at the time the Travel Act was under consideration, no legislature had ever treated "commercial" bribery as severely as the various crimes ultimately specified in that statute.[1]

As to the second objective, achieving national uniformity, we find that in 1960—the year before the Travel Act was enacted—one half the states imposed no criminal sanctions upon commercial bribery, twelve had limited statutes, and only thirteen had general states punishing such an offense. Among the states which punished the particulr conduct here involved (payments to a purchasing agent) potential prison terms varied from 6 months (Nebraska, Washington), to a year (Connecticut, Louisiana, Massachusetts, Michigan, New York, Pennsylania, Rhode Island, South Carolina, Virginia, Wisconsin). See Note, 108 U.Pa.L.Rev. 848 (1960), Chart pp. 864, 866. Since the Travel Act was enacted, New York has reduced the possibility of imprisonment to a maximum of three months [N.Y.Penal Law §§ 180.00, 70.15 (2)]. In other words, the interpretation of the Travel Act which the government here urges would in some states have the drastic effect of converting a minor state offense into a major federal felony, while in other states it would have no effect whatever. In neither event would it assist the states by making available federal punishment comparable

[1] One might well disagree with the legislative judgment that thus downgrades a crime characteristically committed by the establishment. However it has not been suggested that any such consideration was urged before the Congress when it was considering the Travel Act.

to that which they, in their legislative judgment, had already fixed for the offense involved. I need not—and for present purposes do not—question the Congress' power to create such a situation. However, I find absolutely no evidence that the Congress harbored any such intent. *Cf.* United States v. Bass (1972) 404 U.S. 336, 349, 92 S.Ct. 515, 30 L.Ed.2d 488, United States v. Enmons (1973) 410 U.S. 396, 93 S.Ct. 1007, 35 L.Ed.2d 379.

Counts 26 through 48 are accordingly dismissed. Since Count 1 charges only a conspiracy to violate the Travel Act, it too is dismissed.

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APPENDIX VII

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Memorandum

72 Cr. 1126 HRT

UNITED STATES OF AMERICA

—against—

FRANK CALLAHAN ET AL., *Defendants.*

TYLER, D. J.

This memorandum is directed to the various motions submitted by the defendants Frank Callahan, Jenks Metals Incorporated and Jenks Metals Exports, Incorporated, submitted on Friday, December 1, 1972.

MOTIONS TO DISMISS THE INDICTMENT

In counts 1 through 20 of the indictment, defendants are charged with violating 18 U.S.C. § 1952, by having traveled in and used the facilities of interstate and foreign commerce with intent to distribute the proceeds of "bribery" as that is defined and proscribed by §180 of the

New York Penal Law. Briefly stated, it is the position of the moving defendants that Congress did not intend to have § 1952 apply to commercial bribery as prohibited by the New York statute. This contention is without merit, since § 1952 on its face is clearly to the contrary. Thus, the motion to dismiss the first 20 counts of the indictment is denied. See *United States* v. *Nardello,* 393 U.S. 286 (1969); *United States* v. *Corallo,* 413 F.2d 1306, at 1323 (2d Cir. 1969).

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